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No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES
OF CHICAGO & FANNIE MAE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents Neighborhood Housing Services of Chicago and Fannie Mae (collectively "Respondents") do not dispute most of the arguments that Petitioner Charmaine Hamer ("Ms. Hamer") makes in support of certiorari.

Respondents do not dispute that the Seventh Circuit's decision is in direct conflict with this Court's precedents, and they make no attempt to defend the Seventh Circuit's judgment. Indeed, as the Petition explains in detail (Pet. 11-13), this Court has repeatedly held that court-promulgated rules that do not derive from a statute are not jurisdictional in nature. Therefore, the Seventh Circuit's conclusion that Federal Rule of Appellate Procedure 4(a)(5)(C)—which does not derive from a statute—can deprive a court of appeals of jurisdiction is not only erroneous, but also irreconcilable with this Court's cases. The Brief for Respondents in Opposition ("Opposition" or "Opp.") offers no response to this argument. Certiorari is warranted to address the Seventh Circuit's departure from this Court's precedents.

Respondents also do not dispute that there is a circuit conflict on the jurisdictionality of Rule 4(a)(5)(C); nor do they deny that the Question Presented is important and warrants this Court's review. Instead, Respondents mainly argue that certiorari should be denied: (i) because the circuit conflict is not sufficiently developed, (ii) because a grant of certiorari would require Respondents to argue—contrary to Respondents' arguments to the Seventh Circuit—that Rule 4(a)(5)(C) *is* jurisdictional, and (iii) because Respondents believe that Ms. Hamer

should not prevail at the Seventh Circuit for reasons unrelated to the jurisdictionality of Rule 4(a)(5)(C).

Respondents' arguments opposing certiorari do not withstand scrutiny. First, Respondents place undue emphasis on the fact that some of the appellate courts that have addressed the jurisdictionality of Rule 4(a)(5)(C) have done so in unpublished decisions. But this argument fails to recognize that this Court grants certiorari to resolve conflicts among unpublished decisions from different courts of appeals, and it also grants certiorari where the decision under review is itself unpublished. Moreover, Respondents incorrectly argue that this case is a poor vehicle to address the jurisdictionality of Rule 4(a)(5)(C) merely because *Respondents themselves* argued to the Seventh Circuit that Rule 4(a)(5)(C) is not jurisdictional. But because the question of jurisdiction may be raised at any time, Respondents are free to argue to this Court that a violation of Rule 4(a)(5)(C) deprives a court of appeals of jurisdiction. Finally, Respondents' view that they should prevail at the Seventh Circuit on other grounds is not a basis for denying certiorari. Even if any of Respondents' arguments had merit—which they do not, as explained in further detail below—a conclusion by this Court that Rule 4(a)(5)(C) is a nonjurisdictional rule would require reversal of the Seventh Circuit's judgment, which explicitly states that the dismissal of Ms. Hamer's appeal is for lack of jurisdiction. Pet. App. 6.

ARGUMENT

I. A Circuit Conflict Undisputedly Exists, and Is Sufficiently Developed for This Court's Review

Respondents admit that the Seventh Circuit's decision is irreconcilable with the D.C. Circuit's decision in *Youkelsone v. Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011). Opp. 7. Indeed, Respondents are correct: *Youkelsone* held that Rule 4(a)(5)(C) was nonjurisdictional and concluded that the appellee had forfeited its right to seek dismissal for a violation of the Rule, and therefore addressed the merits of the appeal. *Youkelsone*, 660 F.3d at 475-76. The Seventh Circuit, in sharp contrast, held that Rule 4(a)(5)(C) is a jurisdictional rule that is not subject to forfeiture or waiver, and therefore refused to address the merits of the appeal. Pet. App. 4.

Nevertheless, Respondents seek to downplay the admitted circuit conflict concerning the jurisdictionality of Federal Rule of Appellate Procedure 4(a)(5)(C) by focusing on the fact that some of the appellate-court decisions that have addressed this issue are unpublished. Opp. 2, 6-9. Respondents are incorrect. Certiorari should not be denied merely because some of the decisions in a circuit conflict are unpublished. To the contrary, this Court grants certiorari to resolve circuit conflicts that involve unpublished decisions, and even grants certiorari to review decisions that are themselves unpublished. *E.g., Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (reviewing a decision that conflicted with the decisions of other courts of appeals, some of which were unpublished decisions); *see also Kirtsaeng v. John*

Wiley & Sons, Inc., 136 S. Ct. 1979, 1984 (2016) (reviewing an unpublished "brief summary order" that conflicted with the decisions of other courts of appeals); *Krupski v. Costa Crociere S.p.A*, 560 U.S. 538, 546 n.2 (2010) (reviewing an unpublished decision that conflicted with decisions from other circuits). Regardless, the unpublished nature of the decisions from some of the courts of appeals that have addressed the jurisdictionality of Rule 4(a)(5)(C) should not dissuade this Court from granting certiorari here, especially because the Seventh Circuit's precedential decision in this case: (i) conflicts with at least one precedential decision from the D.C. Circuit, as Respondents admit (*see* Opp. 6-8), and (ii) is irreconcilable with this Court's precedents, as Ms. Hamer argued in the Petition (Pet. 11-13) and is unchallenged in the Opposition. Moreover, the fact that different circuits come to opposite conclusions concerning the jurisdictionality of Rule 4(a)(5)(C)—and believe the issue to be too clear to warrant a precedential decision—highlights the confusion of the courts of appeals in this area and reinforces the need for this Court's intervention.

Respondents also wrongly argue that the Ninth Circuit's treatment of Rule 4(a)(5)(C) in *Abel v. Sullivan*, 326 F. App'x 431 (9th Cir. 2009) is dicta. Opp. 7. To the contrary, the Ninth Circuit in *Abel* concluded that it had jurisdiction over the appeal on two separate bases. *Abel*, 326 F. App'x at 432-33. First, the Ninth Circuit concluded it had jurisdiction over the appeal despite the appellant's violation of Rule 4(a)(5)(C) because the Rule does not derive from a statute. *Id.* at 432. Second, the Ninth Circuit concluded that it had jurisdiction over the appeal

because the appellant's timely filed motion for an extension of time constituted the functional equivalent of a notice of appeal. *Id.* at 432-33. Because the Ninth Circuit's conclusion that Rule 4(a)(5)(C) is nonjurisdictional establishes, by itself, that the Ninth Circuit had jurisdiction over the appeal, its discussion of Rule 4(a)(5)(C) is not dicta.[1]

Multiple courts of appeals have considered the jurisdictionality of Rule 4(a)(5)(C), and have reached differing conclusions. This Court should grant certiorari to resolve the circuit conflict.

II. This Case Is an Excellent Vehicle to Address the Question Presented

A. The Parties Are Well-Suited to Present Arguments on the Jurisdictionality of Rule 4(a)(5)(C)

Respondents argue that this Court should deny certiorari because the parties, especially Respondents, are not "in the best position to present this Court with the most fulsome exposition of the issue." Opp. 9. Respondents are mistaken.

Respondents argue that their ability to defend the Seventh Circuit's judgment is now "impaired" by their previous arguments to the Seventh Circuit that Rule 4(a)(5)(C) is not jurisdictional. Opp. 10. Respondents,

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[1] Additionally, although Respondents now dismiss the discussion of Rule 4(a)(5)(C) in *United States v. Hawkins*, 298 F. App'x 275 (4th Cir. 2008) as dicta (Opp. 8), Respondents themselves cited *Hawkins* to the Seventh Circuit to show that the Fourth Circuit has characterized Rule 4(a)(5)(C) as jurisdictional. Pet. App. 77 n.6.

however, ignore that a challenge to a federal court's subject-matter jurisdiction may be raised at any stage of litigation, even for the first time before this Court. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (citing *Capron v. Van Noorden*, 6 U.S. 126 (2 Cranch 126) (1804)). Therefore, Respondents' arguments to the Seventh Circuit do not impede them from arguing to this Court that Rule 4(a)(5)(C) is a jurisdictional rule. Although the fact that the Seventh Circuit adopted a jurisdictional rule in Respondents' favor—a rule that Respondents expressly advocated against—may reinforce the conclusion that the Seventh Circuit's decision was incorrect, Respondents' arguments to the Seventh Circuit provide no basis for denying certiorari. Moreover, if Respondents decline to defend the Seventh Circuit's judgment, this Court can appoint an *amicus curiae* to argue in support of the judgment, as this Court has done before. *See, e.g., Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015) (noting that an *amicus curiae* was appointed to defend the Fifth Circuit's judgment dismissing an appeal for lack of jurisdiction where the government did not support the jurisdictional holding); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (noting that an *amicus curiae* was appointed to defend the Second Circuit's conclusion that a copyright statute had jurisdictional significance where no party supported the jurisdictional holding). For these reasons, Respondents' arguments to the Seventh Circuit should not dissuade this Court from granting certiorari.

Additionally, Respondents mistakenly assert that Ms. Hamer is not in a position to argue the jurisdictionality of Rule 4(a)(5)(C) because she did not also argue that her October 8, 2015 motion for an

extension of time (Pet. App. 57-59) constituted the functional equivalent of a notice of appeal. Opp. 9-10. But as Respondents argued to the Seventh Circuit—an argument with which the Seventh Circuit implicitly agreed[2], and that Ms. Hamer does not challenge—that motion did not constitute the functional equivalent of a notice of appeal because, among other reasons, it "contained no . . . definitive statement of intent to appeal; rather, the motion purported to seek more time so that 'new counsel . . . [could] evaluate [the district court's] judgment and determine whether an appeal should be pursued.'" Pet. App. 85. Contrary to Respondents' implication (Opp. 9-10), the relevant inquiry in this case is whether the timing of Ms. Hamer's December 11, 2015 notice of appeal (Pet. App. 61)—which was undisputedly timely by statute but untimely under Rule 4(a)(5)(C)—deprived the Seventh Circuit of jurisdiction. Ms. Hamer's decision not to argue that her October 8, 2015 motion for an extension of time constituted the functional equivalent of a notice of appeal has no bearing on this question, and is therefore not an obstacle to this Court's ability to: (i) determine the jurisdictionality of Rule 4(a)(5)(C),

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[2] In dismissing the appeal for lack of jurisdiction, the Seventh Circuit implicitly concluded that the October 8, 2015 motion for an extension of time was not the functional equivalent of a notice of appeal. If it had concluded that the motion *was* the functional equivalent of a notice of appeal, the appeal would have been timely without any extension of time, because the motion was filed less than thirty days after the district court's entry of judgment. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). The Seventh Circuit therefore would not have dismissed the appeal if it had concluded that the motion for an extension of time was the functional equivalent of a notice of appeal.

and (ii) reverse the Seventh Circuit's judgment if it agrees with Ms. Hamer that this Rule is not jurisdictional.

B. No Other Issues Prevent This Court from Addressing the Jurisdictionality of Rule 4(a)(5)(C)

Respondents additionally argue that certiorari should be denied because Ms. Hamer's appeal to the Seventh Circuit might fail for reasons other than the Seventh Circuit's jurisdictional determination. Opp. 11. Respondents are wrong.

1. Respondents' View of the Merits of Ms. Hamer's Employment-Discrimination Claims Does Not Warrant the Denial of Certiorari

Failing to defend the Seventh Circuit's judgment, Respondents focus instead on the merits of Ms. Hamer's employment-discrimination claims. Opp. 11. Although Ms. Hamer strongly disagrees with Respondents' characterization of the facts leading to the termination of her employment (Opp. 3) and with Respondents' assessment of the merits of her discrimination claims, these issues are not relevant to the question before this Court: the jurisdictionality of Rule 4(a)(5)(C). Because the Seventh Circuit found that it lacked jurisdiction over the appeal, it did not reach the merits of Ms. Hamer's discrimination claims. Pet. App. 4. Therefore, the question before this Court is not whether the district court's grant of summary judgment was erroneous. Rather, the Question Presented—as applied to this case—is whether the Seventh Circuit had jurisdiction to consider Ms.

Hamer's arguments that summary judgment was improperly granted. If this Court grants certiorari and reverses the Seventh Circuit's jurisdictionality determination, the Seventh Circuit may then address the merits of the appeal, which Ms. Hamer continues to believe should result in the reversal of the district court's summary judgment in favor of Respondents. As it stands, however, the Seventh Circuit has not reviewed the district court's grant of summary judgment. Instead, it simply dismissed the appeal for lack of jurisdiction. Pet. App. 4-6. Certiorari is warranted to determine whether Rule 4(a)(5)(C) has jurisdictional implications.

2. Respondents' Remaining Nonjurisdictional Arguments Do Not Warrant the Denial of Certiorari

Respondents also wrongly argue that certiorari should be denied because Ms. Hamer's appeal could be dismissed under Rule 4(a)(5)(C) on nonjurisdictional grounds. Opp. 11. As an initial matter, Respondents are incorrect as a matter of procedure. Specifically, even if this Court were to conclude that (i) Rule 4(a)(5)(C) is nonjurisdictional, but that (ii) the Rule still requires dismissal, reversal of the Seventh Circuit's judgment would still be required because its judgment explicitly dismisses the appeal for lack of jurisdiction. Pet. App. 6. More importantly, however, Respondents ignore that if Rule 4(a)(5)(C) is found to be a nonjurisdictional claim-processing rule, then the Rule is subject to waiver, forfeiture, and the unique-circumstances doctrine. Indeed, as explained in detail below, waiver, forfeiture, and the unique-circumstances doctrine all excuse the timing of Ms. Hamer's notice of

appeal if this Court determines that Rule 4(a)(5)(C) is nonjurisdictional.

Nonjurisdictional rules are subject to waiver and forfeiture. *See, e.g., Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (distinguishing jurisdictional rules from nonjurisdictional claim-processing rules on the ground that, among other things, subject-matter jurisdiction is not subject to waiver or forfeiture); *Mobley v. C.I.A.*, 806 F.3d 568, 578 (D.C. Cir. 2015) (noting that because it is a claim-processing rule, "[o]bjections based on FRAP 4(a)(5)(C) therefore can be forfeited or waived."). If Rule 4(a)(5)(C) is found to be nonjurisdictional, Respondents forfeited—and in fact waived—any argument that Ms. Hamer's appeal was untimely under that Rule. First, Respondents forfeited their right to object to the district court's sixty-day extension of time for Ms. Hamer to file a notice of appeal. During the two months that passed between the district court's extension of time (Pet. App. 60) and Ms. Hamer's filing of her notice of appeal (Pet. App. 61), Respondents never opposed or otherwise objected to the district court's extension of time. Accordingly, Respondents forfeited their right to rely on Rule 4(a)(5)(C), because they "wait[ed] too long to raise the point." *Kontrick*, 540 U.S. at 456. Additionally, before the Seventh Circuit, Respondents affirmatively waived their right to rely on Rule 4(a)(5)(C) when they stated in their Joint Corrected Docketing Statement that the Seventh Circuit had jurisdiction over the case because "on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal" (Pet. App. 63), and then reiterated on the next page that "[Ms. Hamer] timely filed a Notice of Appeal[]" (Pet. App. 64). It was not until after the Seventh Circuit inquired about the appeal's timeliness

that Respondents argued that Ms. Hamer's appeal was untimely. Pet. App. 68-86. Accordingly, if Rule 4(a)(5)(C) is found to be nonjurisdictional, then Respondents' forfeiture and outright waiver preclude them from seeking dismissal under Rule 4(a)(5)(C).

Additionally, if Rule 4(a)(5)(C) is found to be nonjurisdictional, the unique-circumstances doctrine will excuse the timing of Ms. Hamer's notice of appeal. As the Seventh Circuit recognized, "Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal[.]" Pet. App. 4. Accordingly, if Rule 4(a)(5)(C) is determined to be a nonjurisdictional claim-processing rule, the unique-circumstances doctrine will preclude dismissal of Ms. Hamer's appeal under Rule 4(a)(5)(C). *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17 (1962) (finding that the "unique circumstances" of the case excused the late filing of a notice of appeal where the late filing was caused by the district court's erroneous extension of time); *see also Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 385-87 (1964) (recognizing that "unique circumstances" excused the late filing of a notice of appeal where the late filing was caused by the district court's erroneous assurance that the appellant had filed post-trial motions "in ample time"). This Court's treatment of the unique-circumstances doctrine in *Bowles v. Russell*, 551 U.S. 205 (2007) does not change the outcome. In *Bowles*, this Court limited the unique-circumstances doctrine established by *Harris Truck Lines* and *Thompson* only "to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 214. If Rule 4(a)(5)(C) is

nonjurisdictional, as Ms. Hamer argues, then the unique-circumstances doctrine will apply here. *See, e.g., Mobley*, 806 F.3d at 577-78 (applying the unique-circumstances doctrine to excuse the filing of an untimely post-judgment motion under a nonjurisdictional rule where the untimeliness was caused by the district court's erroneous assurance regarding the due date of post-trial motions); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. 2008) (noting that the unique-circumstances doctrine may be used to excuse noncompliance with nonjurisdictional rules).

In sum, Respondents' argument for dismissal of Ms. Hamer's appeal under Rule 4(a)(5)(C) on nonjurisdictional grounds lacks merit, and in any event should not dissuade this Court from granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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